

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBAN LEE AUTHOR CALIFF,

Defendant-Appellant.

UNPUBLISHED

June 14, 2007

No. 270670

Wayne Circuit Court

LC No. 02-002374-01

Before: Fitzgerald, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted his sentence for second-degree home invasion, MCL 750.110a(3), imposed after his conviction for a probation violation. Defendant was sentenced to 5 to 15 years in prison following a remand from this Court. We affirm.

Defendant pleaded guilty to second-degree home invasion. The statutory sentencing guidelines established a minimum term range of 10 to 19 months. The trial court sentenced defendant to serve a term of two years' probation. Subsequently, defendant pleaded guilty to third-degree home invasion, MCL 750.110a(4), and was sentenced to one and one-half to five years in prison for that offense.

Thereafter, defendant pleaded guilty of violating his probation in the instant case. Initially, the trial court sentenced him to 5 to 15 years in prison, with credit for 109 days, on the underlying conviction of second-degree home invasion. As defendant was being escorted from the courtroom, he made an intemperate remark of uncertain content that caught the attention of the trial court. The trial court recalled the case, informed defendant that such disrespect would not be tolerated, and resentenced him to 10 to 15 years in prison.

Defendant appealed to this Court by delayed leave granted. Defendant argued, and this Court agreed, that the trial court had no authority to resentence him after it had imposed a valid sentence. This Court vacated the ten-year minimum term imposed by the trial court, and remanded for reinstatement of the original five-year minimum term. *People v Califf*, unpublished per curiam opinion of the Court of Appeals, issued August 16, 2005 (Docket No. 254134). In so doing, this Court noted that defendant did not challenge the original minimum term of five years on the ground that the trial court failed to articulate substantial and compelling reasons for exceeding the guidelines. *Califf, supra* at 2 n 2, citing *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003); *People v Hendrick*, 261 Mich App 673; 683 NW2d 218 (2004),

aff'd in part and rev'd in part on other grounds 472 Mich 555 (2005). This Court did, however, hold that defendant's initial sentence was valid. *Id.* at 2 n 3, citing *People v Moore*, 468 Mich 573, 579; 664 NW2d 700 (2003). Defendant sought leave to appeal to our Supreme Court, and apparently sought to vacate the entire sentence and consider his newly raised claim of ineffective assistance of counsel. However, our Supreme Court denied leave. *People v Califf*, 474 Mich 981; 707 NW2d 194 (2005).

Defendant moved for relief from judgment in the trial court. He argued that the sentencing guidelines applied to his probation revocation sentence and that counsel was ineffective for failing to contest the trial court's failure to articulate substantial and compelling reasons for departing from the guidelines. The trial court reinstated the original sentence pursuant to this Court's order, but denied defendant's motion for relief from judgment.

As noted in this Court's previous opinion, defendant could have raised the issue whether the trial court erred in failing to articulate substantial and compelling reasons for departing from the guidelines in his earlier appeal. MCR 6.508 provides in pertinent part:

(D) Entitlement to Relief. The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion

* * *

(3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates

(a) good cause for failure to raise such grounds on appeal or in the prior motion, and

(b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that,

* * *

(iv) in the case of a challenge to the sentence, the sentence is invalid.

Defendant argues that counsel provided ineffective assistance by failing to challenge the trial court's decision to depart from the guidelines without reciting adequate reasons for doing so. Defendant correctly notes that a sentence following a probation revocation is subject to the guidelines. *People v Hendrick*, 472 Mich 555, 557; 697 NW2d 511 (2005). Thus, under other circumstances, a defendant might show good cause for relief under MCR 6.508 in counsel's failure to argue on direct appeal that the trial court improperly departed from the sentencing guidelines. However, as the trial court noted in its decision on defendant's motion for relief from judgment, appellate counsel's "failure" here instead may have been a valid decision to essentially "winnow out weaker arguments and focus on those more likely to prevail" *People v Reed*, 449 Mich 375, 391; 535 NW2d 496 (1995). As noted, this Court determined that defendant's initial sentence was not invalid. This finding was central to defendant's ability to obtain relief on

appeal. Counsel's appellate arguments, which led to this finding, saved defendant five years of his minimum sentence. We thus find it questionable whether appellate counsel acted objectively unreasonably here. Also, because this Court has already found defendant's initial sentence to be valid, even if defendant has met his burden of establishing good cause, he cannot show actual prejudice under MCR 6.506. Additionally, defendant cannot establish actual prejudice because, after our own review of the record, we are satisfied that the trial court did state substantial and compelling reasons to depart from the sentencing guidelines. Specifically, the trial court cited defendant's extensive criminal history, poor probation adjustment, and continued criminal activity. Under the circumstances, we find that defendant has not established grounds for relief from judgment.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ David H. Sawyer
/s/ Peter D. O'Connell